

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**In re: SUBPOENA FOR INSPECTION  
AND SAMPLING OF PREMISES  
OWNED BY NON-PARTIES IN THE  
MATTER OF:**

**STATE OF OKLAHOMA, et al.,  
Plaintiffs**

**vs.**

**TYSON FOODS, INC., et al.,  
Defendants.**

**Case No. 4:05-CV-00329-TCK-SAJ**

**POULTRY GROWERS' SUPPLEMENT TO REPLY TO STATE'S  
RESPONSE IN OPPOSITION TO POULTRY GROWERS'  
OBJECTIONS AND MOTION TO QUASH SUBPOENAS  
FOR INSPECTION AND SAMPLING OF PREMISES  
OWNED BY NON-PARTIES, OR ALTERNATIVELY,  
MOTION FOR PROTECTIVE ORDER AND BRIEF IN SUPPORT**

This Supplement to the Reply to State's Response in Opposition to Poultry Growers'<sup>1</sup> Motion to Quash is submitted in direct answer to Honorable Magistrate Joyner's question regarding whether Plaintiff has waived sovereign immunity in the present case.

These Poultry Growers responded indicating that the State **has waived sovereign immunity** but did not have a case citation for this proposition. We are pleased to provide the case of Berrey, et al. v. Asarco Incorporated, et al., 439 F.3d 636 (10<sup>th</sup> Circuit 2006), which is a case originating out of the United States District Court for the Northern District of Oklahoma. In

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<sup>1</sup> These non-parties are: Bill R. Anderson; Steve Butler, allegedly d/b/a Green Country Farms; Ren Butler and Georgia Butler; Julie Anderson Chancellor; Roger D. Collins; Franklin A. Glenn and Kenneth D. Glenn and Sondra D. Glenn; Juana Loftin; Larry McGarrah and Priscilla McGarrah; Jim L. Pigeon and Michele R. Pigeon; Joel J. Reed and Rhonda Reed and Caleb Reed and Cory Reed; W. A. Saunders and Bev Saunders; Robert V. Schwabe, II; and David R. Wofford and Robin L. Wofford.

that case, the District Court held, and the Tenth Circuit affirmed, that Indian Tribes, there the Quapaw Tribe, possess common-law immunity from suit enjoyed by sovereign powers and that the Quapaw Tribe waived its immunity by the bringing of its CERCLA action. The Tenth Circuit stated: “The Supreme Court has recognized that when the United States brings suit, it impliedly waives its immunity as to all claims asserted by the defendant in recoupment. ... Claims in recoupment arise out of the same transaction or occurrence, seek the same kind of relief as the plaintiff, and do not seek an amount in excess of that sought by the plaintiff.” See F.D.I.C. v. Hulsey, 22 F.3d 1472 (10<sup>th</sup> Cir. 1994)

For the Defendants, the law is clear and well-established that for any injuries to the property of any of the Defendants, i.e. poultry or lands, arising out of these proceedings, Plaintiff has waived sovereign immunity by the bringing of its CERCLA claim. This Court has jurisdiction and authority to impose financial assurance requirements as a pre-condition to Plaintiff’s ill-conceived pseudo-science experiment that impacts Defendants’ property

With regard to these Poultry Growers, we ask the Court to keep in mind these Poultry Growers’ firm opposition to any sampling on their properties without Plaintiff’s first demonstrating a causal link between the alleged contamination of the Illinois River and the lawful business operations of Poultry Growers. That said, we also remind the Court that these Poultry Growers have asserted and believe the Court should find that any soil sampling by Plaintiff should only occur **after** Plaintiff has complied with the United States and Oklahoma Constitutions by completing eminent domain proceedings to compensate these Poultry Growers prior to the taking of their property, i.e. up to 720 samples of soil per farm, which Plaintiff has proposed. In those eminent domain proceedings, Plaintiff will similarly waive sovereign

immunity and in those proceedings these Poultry Growers can assert as counterclaims any injuries they receive from Plaintiff's invasive assault on their properties.

Since Plaintiff has made it clear to the Court that Plaintiff does **not** intend to compensate these Poultry Growers for any injuries they suffer as a result of Plaintiff's invasive assault on their properties, we hope it is not lost upon the Court that there is **no remedy** available to these Poultry Growers outside of eminent domain proceedings.

### **CONCLUSION**

For the reasons stated above and in all of their papers filed herein these Poultry Growers request that the Court quash the Subpoenas issued to them or, alternatively, issue a protective order directing that the Plaintiff's proposed discovery activities be stayed until such time as the Plaintiff has demonstrated compliance with all applicable laws, rules and regulations of the State of Oklahoma,<sup>2</sup> and until such time as the Plaintiff has completed eminent domain proceedings to compensate these Poultry Growers for the taking proposed by the State.

Respectfully submitted,

s/ D. Kenyon Williams, Jr.

Michael D. Graves, OBA #3539

D. Kenyon Williams, Jr., OBA #9643

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**ATTORNEYS FOR POULTRY GROWERS**

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<sup>2</sup> In addition, should the Court allow Plaintiff ultimately to perform some inspection and sampling acts, these Poultry Growers would need an enforceable protective order to ensure the Plaintiff performs only the specific acts authorized by this Court.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 19<sup>th</sup> day of May, 2006, a copy of the above and foregoing was sent via facsimile to the following counsel of record:

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Secretary of the Environment  
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and that an electronic version of the same was sent this date to the following:

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s/D. Kenyon Williams, Jr.

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